

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

CITY OF BILOXI, MISSISSIPPI

PLAINTIFF

V.

CASE NO. 1:19-cv-363-LG-RHW

FEDERAL EMERGENCY
MANAGEMENT AGENCY and
PETER T. GAYNOR, in his official capacity.

DEFENDANTS

COMPLAINT

Plaintiff, City of Biloxi, Mississippi (“Biloxi”) files this its Complaint against Defendants, Federal Emergency Management Agency (“FEMA”) and Peter T. Gaynor, Administrator of the Federal Emergency Management Agency (collectively “FEMA”), and states:

1. This is an action for administrative review, declaratory relief, and damages arising from FEMA’s failure to comply with the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121, et seq. (“Stafford Act”), and the Administrative Procedure Act, 5 U.S.C. §§ 701-706, in connection with the disbursement of disaster assistance funds to Biloxi to repair approximately 170 miles of the City’s potable water, sanitary sewer collection and storm drainage system which were damaged by Hurricane Katrina in 2005.

2. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331.

3. By affirmatively appearing before this Court to seek relief against an agency of the United States, Biloxi is not consenting to jurisdiction over any issue otherwise barred by the Eleventh Amendment and reserves all Constitutional protections that Amendment provides.

4. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391. An agency of the United States is a defendant and Biloxi resides in this judicial district. Further, a substantial portion of events giving rise to the subject cause occurred in the Southern District of Mississippi.

Parties

5. Biloxi is a municipal entity and political subdivision of the State of Mississippi, operating within Harrison County, Mississippi, Second Judicial District, which may be served with process by and through its Municipal Clerk, Stacy Thacker, at 140 Lameuse Street, Biloxi, MS 39530.

6. FEMA was created in 1979 as the result of the merger of several pre-existing federal agencies that handled disaster related responsibilities. FEMA is the federal agency designated to administer the provisions of the Stafford Act.

7. Peter T. Gaynor is the Administrator of FEMA. In that capacity, Administrator Gaynor is responsible for the overall administration of FEMA. Administrator Gaynor is sued in his official capacity.

Statement of Facts

8. In order to fulfill its obligation to provide potable water, sanitary sewer and storm drainage throughout the City of Biloxi, Biloxi operates and maintains 170 miles of potable water supply and distribution system, sanitary sewer system and storm drainage system.

9. On August 29, 2005, Hurricane Katrina, a Category 4 hurricane, made landfall in Biloxi, Mississippi creating a twenty-two foot storm surge and major flooding to the majority of the peninsula on which Biloxi is located. The unprecedented storm surge caused by Hurricane Katrina caused complete devastation to Biloxi's sanitary sewer system, potable water system and storm drainage system. The 170 miles of water, sewer and drainage system devastation were separated out in fourteen areas of destruction.

10. In the case of Hurricane Katrina, President George W. Bush declared that a major disaster existed and initiated the federal government's involvement in the hurricane recovery effort pursuant to the Stafford Act. 70 FR 67188 (Nov. 4, 2005). The Stafford Act generally provides assistance essential to meeting immediate threats to life and property resulting from a major disaster,

as well as for hazard mitigation measures that substantially reduce the risk of future damage. 42 U.S.C. §§ 5170b and 5170c.

11. The Stafford Act specifically authorizes FEMA to fund repairs to public facilities damaged by a major disaster. 42 U.S.C. § 5172(a). Public facilities include any publicly owned flood control, navigation, irrigation, reclamation, public power, sewage treatment and collection, water supply and distribution, watershed development, or airport facility. 42 U.S.C. § 5122.

12. In accordance with the foregoing, Biloxi sought and obtained disaster assistance from FEMA. Following Hurricane Katrina, Biloxi undertook damage assessments, obtained repair cost estimates, and submitted them to FEMA. FEMA reviewed each project for its eligibility for assistance and the reasonableness of the estimated repair costs.

13. After FEMA's review, FEMA designated fourteen areas within the City of Biloxi as requiring restoration efforts as it relates to the water, sewer and drainage system devastation. Thus, sixteen Project Worksheets ("PW") were created and "obligated" by FEMA as it relates to these Biloxi infrastructure restoration efforts. The sixteen PWs included the scope of work for the 14 areas and two additional PWs were created for design surveys/geotech services and repairs to lift stations.

14. For the repair projects that FEMA approved, it "obligated" funds and transferred them to a bank account to which the State of Mississippi, Division of Emergency Management ("MEMA") had access.¹ As the repairs progressed, Biloxi submitted invoices to MEMA, which then withdrew funds from the account and paid them to Biloxi after verification that the work had been successfully completed. FEMA, MEMA and Biloxi followed this process for the sixteen PWs (14 area PWs and 2 PWs for design surveys/geotech services and lift stations) and the funds obligated between January 2008 and June 2008. FEMA ultimately "obligated" a total of \$344 million(+) in disaster aid relating

¹ The process known as "obligating" occurs when FEMA decides to fund a repair project and places funds into the account established for the disaster. The process known as "de-obligating" occurs when FEMA reverses its decision to fund disaster assistance and takes back money it previously provided.

to Hurricane Katrina and Biloxi's infrastructure repair project. It was anticipated that the Biloxi infrastructure repairs would be significant and complex. Accordingly, FEMA developed, negotiated and ultimately approved the "obligation" of \$21,711,231.00 in funding specifically for Project Management ("PM") and Resident Project Representative ("RPR") services. PM and RPR services were listed as separate and distinct line items for services and funding in the FEMA-approved PWs that comprises the \$21M originally obligated.

15. By letter dated May 15, 2018, MEMA informed Biloxi that FEMA had "de-obligated" funds for PM and RPR services totaling \$8,820,189.64 of the funds previously transferred to Biloxi and spent on PM and RPR services. These PM and RPR services were imperative for completing the infrastructure repairs needed after Hurricane Katrina.

16. The Department of Homeland Security's Office of Inspector General ("OIG") issued an audit (OIG Audit #OIG-15-131-D) with a recommendation to FEMA to disallow as ineligible \$8,093,971.00 of the \$21,711,231.00 originally obligated by FEMA in funding of PM services as defined in PW 11235. The OIG audit relied exclusively on the Cost Estimating Format ("CEF") Guide in deeming more than \$8 million in funds for PM and RPR services as "unreasonable." The OIG audit recommended that only four percent of the entire construction cost as a "reasonable fee" for PM services.

17. As a direct result of the OIG audit, FEMA elected to de-obligate \$8,820,189.64 in funds for PM services because the cost exceeds the four percent (4%) generally eligible for PM services. FEMA's de-obligation was based OIG's decision to recommend the disallowance of monies for PM and RPR services which exceeded the 4% generally eligible according to the FEMA CEF Guidance Spreadsheet. When FEMA estimated the cost of PM and RPR services for the Biloxi infrastructure project, the CEF Spreadsheet was not used by FEMA officials. Instead, the CEF Spreadsheet was considered by numerous FEMA technical staff, but it was distinguished as

inappropriate and insufficient to estimate the cost of PM and RPR services for Biloxi's complex infrastructure repair project as evidenced by PW 11235 and multiple memoranda drafted by FEMA.  FEMA officials specifically estimated, negotiated, approved and obligated a total of \$21,711,231.00 for PM and Special Services, including RPR services. Such estimations, negotiations and approvals are explicitly documented by FEMA technical staff in PW 11235.

18. FEMA is the Grantor as it relates to disaster assistance grants. MEMA is the Grantee responsible for completing a Request for Public Assistance (FEMA Form 90-49) for each Sub-Grantee (in this case the City of Biloxi is the Sub-Grantee) who requests public assistance. FEMA, as the Grantor, is responsible for approving all PWs, including the scope of work, eligible services and associated costs. Accordingly, *only* FEMA may make available the federal disaster assistance funds (i.e. "obligate" funds) to the Grantee/Sub-Grantee.

19. Nearly ten years after obligating more than \$21 million in disaster assistance funds for PM and RPR services to the City of Biloxi, FEMA chose to deem \$8.8M as "unreasonable," although FEMA specifically authorized such monies be used for PM and RPR services. Such action is a direct violation of the Stafford Act (42 U.S.C. § 5205(c)).

20. In addition, multiple timeline extensions for performance have been granted by FEMA. At this time, the approved timeline for performance and completion of the Biloxi  infrastructure projects extends through December 2024. Accordingly, Biloxi requested an additional \$6,678,918.00 in funding for PM and RPR services in April 2016. Although FEMA acknowledged the fact that the project was so complex as to extend the timeline for performance approximately 10 years beyond what was originally estimated, FEMA refuses to fund the need for additional special  services (PM and RPR services) which are crucial for completion of said project. Not only has FEMA deobligated \$8.8M for PM and RPR services, FEMA refuses to provide additional funding requested .

by the City in the amount of \$6,678,918.00 to cover the cost of PM and RPR services through the completion of the project.

COUNT I

Agency Action Contrary to Law: Violation of 42 U.S.C. § 5205(c)

21. Biloxi incorporates by reference the allegations set forth in paragraphs 1 through 20.
22. Section 705(c) of the Stafford Act provides:
 - (c) Binding Nature of Grant Requirements – A State or local government *shall not* be liable for reimbursement or any other penalty for any payment made under this Act if:
 - (1) the payment was authorized by an approved agreement specifying the costs;
 - (2) the costs were reasonable; and
 - (3) the purpose of the grant was accomplished.

42 U.S.C. § 5205(c) (emphasis added).

23. Biloxi is a state or local government within the meaning of Section 705(c).

24. The Project Management and RPR services estimated to oversee the infrastructure repair work was authorized by an approved agreement specifying the costs; those costs were reasonable; and the purpose of the grant was and is currently being accomplished.

25. Pursuant to the Administrative Procedure Act, 5 U.S.C. § 701, et seq., “a person suffering legal wrong because of agency action or adversely affected or aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review thereof.” 5 U.S.C. § 702.

26. The decision by FEMA to de-obligate the prior payments to Biloxi and require reimbursement of those sums is “final agency action,” adversely affecting Biloxi, and is reviewable in this Court pursuant to the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

27. Under 5 U.S.C. § 706, a reviewing court shall “hold unlawful and set aside agency action, findings, and conclusions” found to be “arbitrary, capricious, an abuse of discretion, or

otherwise not in accordance with the law,” or “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,” or “without observance of procedure required by law.” 5 U.S.C. § 706(a)(2).

28. According to FEMA’s own Recovery Policy (FP 205-081-2), FEMA is prohibited from recovering payments made, e.g. the amount of funds drawn down by the recipient in association with completion of the approved scope of work. On behalf of Biloxi, MEMA has drawn down all funds initially obligated by FEMA for PM and RPR services; thus, such funds cannot now be de-obligated. The de-obligation of \$8.8M is arbitrary, capricious, not in accordance with the law and in excess of its statutory authority under the Stafford Act and FEMA’s own Recovery Policy.



29. The decision by FEMA to de-obligate the prior payments in the amount of \$8,820,189.64 to Biloxi and require reimbursement of those sums is arbitrary, capricious, not in accordance with law, and in excess of its statutory authority under the Stafford Act.

30. The decision by FEMA not to provide additional funding in the amount of \$6,678,918.00 to Biloxi for the additional PM and RPR services needed to complete the project through approved performance completion date of December 2024 is arbitrary, capricious, not in accordance with the law, and in excess of its statutory authority under the Stafford Act.

COUNT II

Agency Action Contrary to Law:
Violation of 42 U.S.C. § 5205(a)(1)

31. Biloxi incorporates by reference the allegations of paragraphs 1 through 30.

32. Section 705(a) of the Stafford Act provides:

(a) Statute of Limitations –

(1) In general – Except as provided in paragraph (2), no administrative action to recover any payment made to a State or local government for disaster or emergency assistance under this Act shall be initiated in any forum after the date that is 3 years after the date of transmission of final expenditure report for the disaster or emergency.

(2) Fraud exception – The limitation under paragraph (1) shall apply unless there is evidence of civil or criminal fraud.

42 U.S.C. § 5205(a).

33. For Hurricane Katrina, Biloxi submitted ninety-five total invoices for PM and RPR services to MEMA, and MEMA approved the draw down of \$21M in funds for such services initially approved and obligated by FEMA. As of May 15, 2015, three years prior to FEMA's deobligation letter, \$17,609,789.24 had been drawn down for PM and RPR services. Final amount drawn down \$21,711,231.18 as of September 11, 2017.

34. The decision by FEMA to de-obligate \$8,820,189.64 for PM and RPR services related to Biloxi infrastructure repair expenditures for Hurricane Katrina more than 3 years later is arbitrary, capricious, not in accordance with law, and in excess of its statutory authority under the Stafford Act.

COUNT III
Agency Action Contrary to Law
Breach of Contract

35. Biloxi incorporates by reference all allegations set forth in paragraphs 1 through 34.

36. When the United States or its agencies enter into contract relations, "its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Franconia Associates v. U.S.*, 536 U.S. 129, 141 (2002) (citing *Mobil Oil Exploration & Producing Southeast, Inc. v. U.S.*, 530 U.S. 604, 607 (2000)). According to Mississippi law, to establish a claim for breach of contract, there must be an existence of a valid and binding contract, a breach of contract by the defendant and money damages suffered by the plaintiff.

37. A valid and binding contract existed between Biloxi and FEMA through PW 11235. Biloxi completed work for PM and RPR services, requested reimbursement through MEMA and MEMA drew down funds previously approved and obligated by FEMA. Defendant FEMA breached the contract by de-obligating these funds previously approved by FEMA/MEMA and subsequently

spent by Biloxi to complete its infrastructure repair project. Biloxi suffers money damages in the amount of \$8.8M – the amount de-obligated by FEMA.

38. FEMA’s decision to de-obligate \$8.8M in funds for PM and RPR services after such services had already been approved, completed and paid constitutes a breach of contract with Biloxi.

COUNT IV
Agency Action Contrary to Law
Bad Faith Breach of Contract

39. Biloxi incorporates by reference all allegations set forth in paragraphs 1 through 38.

40. When the United States or its agencies enter into contract relations, “its rights and duties therein are governed generally by the law applicable to contracts between private individuals.”

Franconia Associates v. U.S., 536 U.S. at 141 (citing *Mobil Oil Exploration*, 530 U.S. at 607). Mississippi law imposes a duty of good faith and fair dealing in the execution of all contracts. The breach of good faith is bad faith characterized by “some conduct which violates standards of decency, fairness and reasonableness.” *Johnston v. Palmer*, 963 So.2d 586, 594 (Miss. Ct. App. 2007) (citing *Cenac v. Murray*, 609 So.2d 1257, 1272 (Miss. 1992)). “‘Bad faith’ is not simply bad judgment or negligence, rather it implies the conscious doing of wrong because of dishonest purpose or moral obliquity.” *Id.* (citing *Bailey v. Bailey*, 724 So.2d 335, 338 (Miss. 1998)).

41. FEMA breached its duty to execute its contract with Biloxi in good faith by acting in ways which violates standards of decency, fairness and reasonableness. FEMA, MEMA and Biloxi worked together to create PW 11235 and determined that \$21M for PM and RPR services was reasonable as evidenced by the language of PW 11235 itself and various memoranda sent between the parties. FEMA deemed the \$21M in funds obligated as reasonable and necessary to complete the complex Biloxi infrastructure project. Eight years later, FEMA relied on an audit provided by a third party (Office of Inspector General Audit No. OIG-15-131-D, August 21, 2015), which was not involved in the negotiations and unaware of the magnitude of the Biloxi infrastructure project, and

decided to de-obligate \$8.8M in funds for PM and RPR services because such costs were “unreasonable.” Not only is it unreasonable for FEMA to rely on a third party completely unfamiliar with the contract and the work being completed to de-obligate such an enormous amount of funding, but it was unfair, indecent, dishonest and against all moral obliquity to de-obligate \$8.8M in funds which had already been approved for reimbursement by MEMA as complying with the scope of work articulated in PW 11235 and spent by Biloxi to carry out the project.

42. FEMA breached its duty to execute its contract extension on timeline of performance with Biloxi in good faith by acting in ways which violate standards of decency, fairness and reasonableness. By extending the timeline to complete the Biloxi infrastructure project through December 2024 (approximately 10 years beyond the date originally estimated), FEMA has admitted and acknowledged the complexity of the project. Biloxi reasonably believed that because the project completion date was extended to 2024 by FEMA, FEMA would also obligate the funding necessary to complete such project, including PM and RPR services. Biloxi has relied on its detriment on the fact that FEMA extended the project timeline until 2024. Along with costs of construction, Biloxi has incurred costs for PM and RPR services. FEMA expects Biloxi to complete the project, yet FEMA is unwilling to fund the services which it originally authorized. It is unfair, unreasonable and against moral obliquity to require Biloxi to complete the project and extend the deadline for completion, but not fulfill its end of the bargain by providing additional funding for special services which are crucial to completion.

43. Further, FEMA’s own Recovery Policy (FP 205-081-2(VII)(B)(1)(b) states, “FEMA is prohibited from recovering payments made, e.g. the amount of funds drawn down by the recipient in association with completion of the approved scope of work. Section 705(c) does not prohibit FEMA from deobligating funds that recipient has not drawn down.” Years after obligating a total of \$21M

for PM and RPR services as it relates to the Biloxi infrastructure repair project, FEMA determined \$8.8M of those funds were unreasonable, and FEMA de-obligated such funds. FEMA should be incapable of de-obligating these funds, however, because the full \$21M obligated for PM and RPR services was drawn down prior to FEMA's determination letter from May 15, 2018. According to its own policy, FEMA should be prohibited from recovering payments made for completed PM and RPR services (\$8.8M in approved scope of work costs) because all such funds were previously drawn down.

44. FEMA's decision to de-obligate \$8.8M in funds for PM and RPR services after such services had already been approved, completed and drawn down (paid) constitutes bad faith.

45. Further, FEMA's decision not to provide \$6.6M in additional funding for PM and RPR services after approving a timeline of performance extension through December 2024 constitutes bad faith.

PRAYER FOR RELIEF

WHEREFORE, Biloxi requests entry of final judgment:

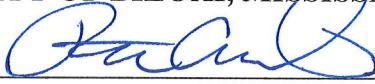
- (1) Reversing FEMA's de-obligation of \$8,820,189.64 million in disaster aid provided to Biloxi for PM and RPR services;
- (2) Directing FEMA to re-obligate those funds which Biloxi received and spent for PM and RPR services related to the Biloxi infrastructure repairs related to damage caused by Hurricane Katrina;
- (3) Prohibiting FEMA from seizing any additional funds or seeking repayment for any of the projects approved by FEMA and completed by Biloxi related to damage caused by Hurricane Katrina;

(4) Directing FEMA to obligate an additional \$6,678,918.00 in funding for PM and RPR services to cover the cost of special services required through the authorized completion date of December 2024; and

(5) Awarding Biloxi such other relief as may be just, proper and equitable.

RESPECTFULLY SUBMITTED, this the 2nd day of July, 2019.

CITY OF BILOXI, MISSISSIPPI

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